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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Petition not printed

No. 111

HOMER C. PRICE,

Petitioner,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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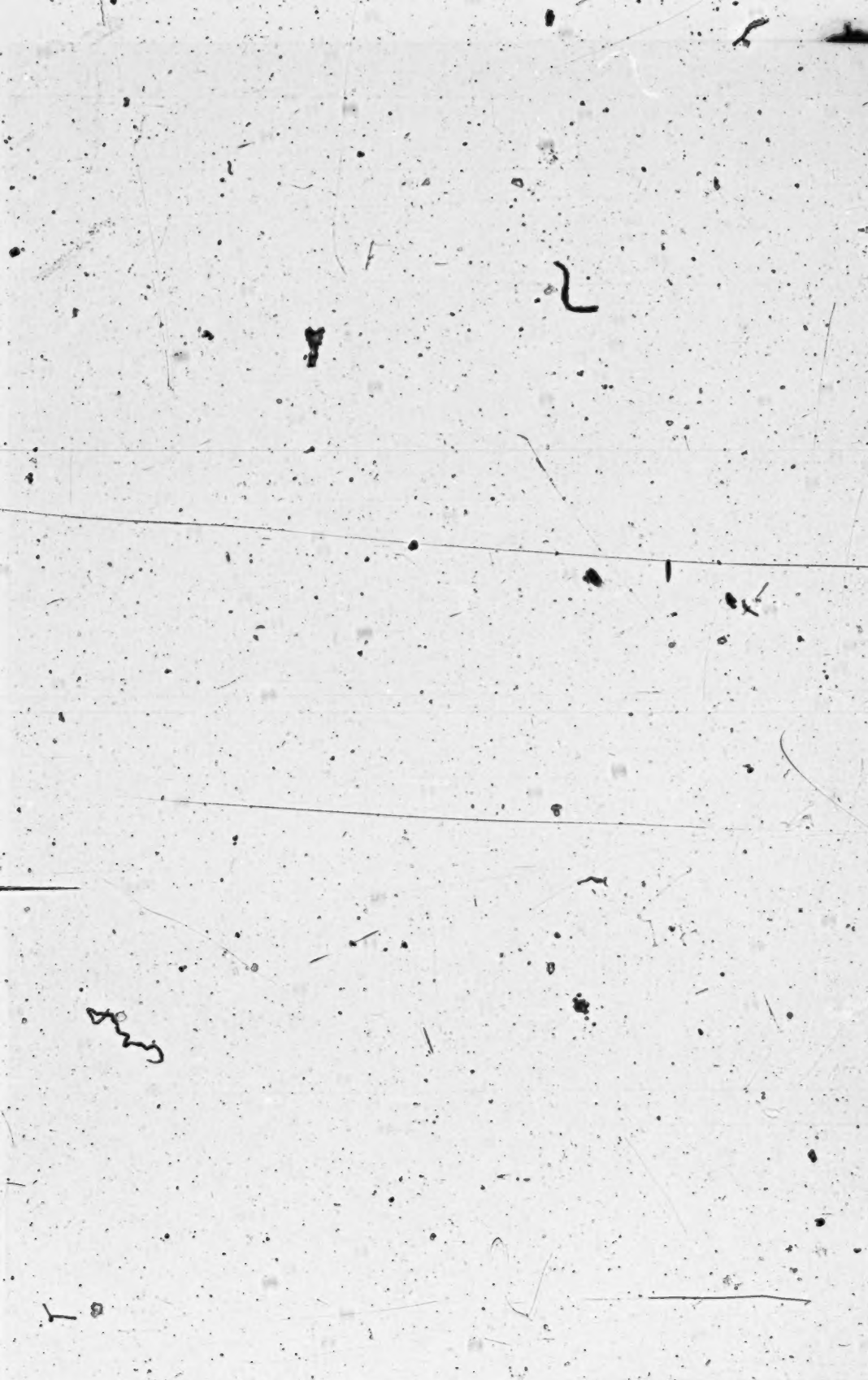

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The District Court denied petitioner's application for writ of *habeas corpus* without opinion (R. 30). The opinion of the majority of the Circuit Court of Appeals affirming the judgment of the District Court and the dissenting opinions are officially reported in 161 F. 2d 705 and may be found at pages 53 to 66 of the record. The opinions on petitioner's motion for an order directing his personal appear-

ance before the Circuit Court of Appeals to argue his appeal are reported in 159 F. 2d 234 and may be found at pages 44 to 52 of the record.

Jurisdiction

The judgment of the Circuit Court of Appeals denying petitioner's motion for an order directing his personal appearance before the court to argue his appeal was entered January 6, 1947 (R. 43-44). The judgment affirming the order of the District Court denying petitioner's application for a writ of *habeas corpus* was entered May 5, 1947 (R. 66). On February 25, 1947, Mr. Justice Reed extended to June 6, 1947, petitioner's time to file a petition for writ of certiorari to review the order of January 6 (R. 67). The petition for writ of certiorari was filed on June 4, 1947, and was granted on June 23, 1947 (R. 67). On the same day petitioner's motion for leave to proceed *in forma pauperis* was granted (R. 67) and on October 13, 1947, an order was entered assigning counsel to present petitioner's cause. The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. § 347).

Statutes Involved

Section 262 of the Judicial Code (Power to Issue Writs):

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. (28 U. S. C. § 377, Mar. 3, 1911, ch. 231, § 262, 36 Stat. 1162.)

Section 272 of the Judicial Code (Appearance Personally or by Counsel):

> In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein. (28 U. S. C. § 394, Mar. 3, 1911, ch. 231, § 272, 36 Stat. 1164.)

Section 761 of the Revised Statutes (Summary Hearing in Habeas Corpus):

> The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require. (28 U. S. C. § 461.)

Questions Presented

1. Whether the District Court erred in denying without hearing or opinion an application for writ of *habeas corpus* alleging that petitioner's conviction had been obtained by the government's knowing use of false testimony when the warden's return in answer to the petition does not challenge the truth of this allegation and defends solely on the ground that petitioner had unsuccessfully initiated three previous *habeas corpus* proceedings, in none of which was this issue properly raised or determined.

2. Whether a circuit court of appeals has power to direct that a prisoner appealing from the denial of his application for writ of *habeas corpus* be brought before the court to argue his own appeal.

Statement

The present proceeding before this Court was initiated January 2, 1946, by a petition for writ of *habeas corpus* in the United States District Court for the Northern District

of California and is predicated upon the allegation "that the government knowingly employed false testimony on the trial, to obtain the conviction". (R. 20). A review of the proceedings leading up to the filing of this fourth petition for writ of *habeas corpus* will be helpful in considering the issues presented by the case at bar.

In 1938, petitioner was indicted (R. 10-14) and convicted (R. 14-16) in the United States District Court for the Eastern District of Michigan under a four-count indictment charging violations of the Federal bank robbery statute, 12 U. S. C. 588(b) and 588(c), by entering a Federally insured bank with intent to rob, robbing the bank by putting an employee in fear, jeopardizing the lives of a bank employee and others by the use of a dangerous weapon, and kidnapping a bank employee in the course of such offenses. Petitioner was sentenced to imprisonment for 65 years (R. 16-17) and committed to Alcatraz Penitentiary (R. 2). Petitioner's unsuccessful efforts to prosecute an appeal from his conviction culminated in the denial by the Sixth Circuit Court of Appeals of his petition for a writ of mandamus seeking to require the District Court to enter a decision upon petitioner's application for an appeal. *Price v. Moinet*, 116 F. 2d 500. Certiorari was denied by this Court upon the ground that the application was not filed within the time allowed by law, 311 U. S. 703, rehearing denied 311 U. S. 729. Petitioner acted as his own counsel in his unsuccessful efforts to secure direct review of his conviction by appeal.

Petitioner is not a lawyer. He has presented his four successive applications for writs of *habeas corpus* to the United States District Court for the Northern District of California without clarity or legal precision. Because of the reliance of the courts below upon these earlier proceedings in denying the present petition, it is necessary to

give a somewhat detailed history of the three earlier applications for writs of *habeas corpus*.

In 1940, petitioner filed an application for writ of *habeas corpus* in the United States District Court for the Northern District of California, seeking his release from imprisonment upon several grounds. The two grounds principally relied upon were that evidence adduced against petitioner at the trial had been obtained in violation of the Fourth Amendment, and that the trial judge had refused to disqualify himself despite prejudice based on his connection with a bank in the vicinity of the robbery. The District Court denied the application for the writ without hearing or opinion and the denial was affirmed by the Circuit Court of Appeals, 125 F. 2d 806. Certiorari was denied by this Court, 316 U. S. 677, rehearing denied 316 U. S. 712. It appears from the record filed with this Court in that proceeding that the application for writ of *habeas corpus*, prepared by petitioner himself, did not allege as a ground for release that his conviction had been obtained by the knowing use of false testimony (Record on petition for certiorari, No. 1081, October Term 1941, pp. 3-15). Petitioner's traverse to the warden's return, however, while not averring the knowing use of false testimony, did call the court's attention to "two different statements" at the trial by the chief prosecution witness, one Donner, and to the "methods . . . used to obtain" this change in testimony (R., No. 1081, p. 87). The traverse did not intimate what those "methods" were. Donner's testimony at the trial was attached as an exhibit (R., No. 1081, pp. 94-199). After the filing of the traverse, the District Court appointed counsel for petitioner (R., No. 1081, p. 200), but subsequent papers in the proceeding were apparently still filed by petitioner in *propria personam*. Petitioner's appeal to the Circuit Court of Appeals assigns as error the trial court's failure to grant him "a fair and impartial trial" in that Donner

reversed his testimony after being taken to the office of the District Attorney (R., No. 1081, p. 234). Point 6 of his petition for certiorari from the judgment in that proceeding seeks to raise this same issue, and asserts "a conspiracy forcing a witness to change his testimony" (p. 43). This point was not, however, referred to by the Circuit Court of Appeals in its opinion or by the Government in its Opposition to Petition for Certiorari in this Court, presumably because not properly raised by petitioner.

In 1942, petitioner filed a second petition for writ of *habeas corpus,* in which he sought release on the grounds set forth in his first petition and also on two principal additional grounds. The first of these new grounds was that petitioner's counsel had been absent from the room during the trial and the other was that petitioner had not had counsel at a preliminary hearing before the U. S. Commissioner. After a hearing, the District Court discharged the writ and the order was affirmed on appeal, 144 F. 2d 260. The petition for writ of certiorari was denied by this Court, 323 U. S. 789, rehearing denied 323 U. S. 819. It appears from the record filed with this Court on the petition for certiorari that this second application for writ of *habeas corpus,* again prepared by petitioner himself, also failed to allege as a ground for release that the conviction had been obtained by the knowing use of false testimony (Record on petition for certiorari, No. 607, October Term, 1944, pp. 4-21). At the hearing before the District Court on this second application, the District Court excluded all evidence of what had occurred during the course of the trial proferred by petitioner's counsel who had been appointed by the court (R., No. 607, p. 71-73), and the knowing use of false testimony does not appear to have been referred to at any stage in this proceeding.

A third petition for a writ of *habeas corpus* was denied by the District Court on August 22, 1945, 61 F. Supp. 995 (R.

22-23). There is nothing in the record or opinion of the District Court to indicate the grounds upon which petitioner relied in this third application, although the opinion of the District Court does state that "petitioner alleges 'that the questions now raised was (sic) not raised in the prior petitions . . .'" The petition was denied by the District Court on the ground that the matters were known to petitioner when he filed the earlier petitions, making the new petition an abusive use of the writ of *habeas corpus*. No appeal was taken from this action and no counsel appears to have been appointed for petitioner.

Petitioner's inartistic and imprecise method of presenting his case continued through the filing of the present petition. On January 2, 1946, petitioner filed his fourth application for writ of *habeas corpus* (R. 5) alleging that he had been denied a fair and impartial trial in that the jury was confused by the presentation of evidence to show perjury before a Notary Public, that the court was not justified in imposing a general sentence on the four counts of the indictment, and that one of the counts did not allege an offense (R. 5-7). On January 8, 1946, the District Court ordered the warden to show cause why the writ of *habeas corpus* should not be issued (R. 19). On January 15, 1946, petitioner filed an amendment to his application adding as a new and separate ground for release the allegation "that the government knowingly employed false testimony on the trial, to obtain the conviction" (R. 20). On January 21, 1946, the warden, through the United States Attorney, filed his return to the order to show cause (R. 20-21). The return did not deny the allegation that the government knowingly employed false testimony on the trial; it simply incorporated by reference the entire record in the three former *habeas corpus* proceedings and asked that the petition be denied on the basis of the District Court's opinion denying the third application. Petitioner's tra-

verse (R. 24-27) stated that the earlier petitions did not contain some of the points presented in the fourth petition and asserted "that petitioner did not in fact have a fair and impartial trial before the trial court, and in fact was denied due process of law" (R. 26).

The District Court denied the petition without hearing or opinion (R. 30). On appeal, a panel of the Circuit Court of Appeals directed that petitioner be brought before the court for the argument of his appeal (R. 41). After the argument, the submission of the cause was set aside (R. 41) and the case was assigned for hearing before the court en banc (R. 42). Petitioner then moved the court en banc for an order directing his appearance for the purpose of arguing his own appeal (R. 42-43). On January 6, 1947, the court denied petitioner's motion for personal appearance (R. 43-44). A majority of the court were of the opinion that circuit courts of appeal are without power to order the production of a prisoner for such purpose (R. 44-48). Judge Stephens stated that he was of the opinion that the court possessed the power to grant the prisoner's motion, but in the exercise of that power he voted to deny the motion (R. 48). Judge Denman filed a dissenting opinion, in which Judge Orr concurred, stating that circuit courts of appeal do have the power to compel a warden to produce the body of his opposing litigant for the purpose of arguing his appeal (R. 48-52).[1]

The appeal was then considered on briefs filed by petitioner and the United States Attorney and oral argument by the Assistant United States Attorney (R. 53). The

[1] The dissenting judges refrained from expressing an opinion on the question whether the court should have exercised this power in the instant case. In his dissent from the action of the court affirming the denial of the petition for writ of *habeas corpus*, however, Judge Denman implied that the discretion should have been exercised in favor of petitioner's motion for personal appearance (R. 58-59, footnote).

brief filed by the United States Attorney on behalf of the warden is reprinted in full in the Appendix. On May 5, 1947, the Circuit Court of Appeals, with Judges Denman and Stephens dissenting, affirmed the order of the District Court denying the application for the writ (R. 66). The majority of the court below, relying upon *Wong Doo* v. *United States*, 265 U. S. 239, held that there was no abuse of discretion in the District Court's dismissal of the petition in view of the three earlier petitions and the "apparent husbanding of grounds" by petitioner.

Specification of Errors to Be Urged

1. The court below erred in failing to direct the District Court to afford petitioner an opportunity to be heard on his allegation that he had been convicted by the government's knowing use of false testimony.

2. The court below erred in holding that there had been an apparent husbanding of grounds for release on petitioner's part and an abusive use of the writ of *habeas corpus*.

3. The court below erred in holding that it was without power to direct that petitioner be brought before it to argue his own appeal.

Summary of Argument

I

Petitioner's allegation that the government knowingly employed false testimony to obtain his conviction stands undenied on the record before this Court. Whether or not this allegation be deemed "improbable and unbelievable," petitioner is entitled to a hearing before the District Court to determine its validity. *Walker* v. *Johnston*, 312 U. S. 275. Petitioner was under no duty to deny in his application for

writ of *habeas corpus* that he knew as much about the suborning of perjury at the time it occurred as he knows now.

II

The court below assumed that petitioner in his earlier application for *habeas corpus* intentionally reserved for later use the ground for release presently relied upon—the government's knowing use of false testimony. On the contrary, petitioner tried and failed to get this point before the courts in the proceeding on his very first application for writ of *habeas corpus*. The assumption of the court below that there had been "an apparent husbanding of grounds" is therefore not only unrealistic as applied to the case of a prisoner in Alcatraz but is directly contrary to the facts in this very proceeding. Furthermore, the "apparent husbanding of grounds," if it was to be relied upon as the basis for decision, presented an issue of fact for the District Court and should have been heard under the rule of the *Walker* case.

III

This Court has repeatedly held that the mere existence of one or more prior petitions for writs of *habeas corpus* is not a sufficient ground to warrant a denial of a new application setting forth a valid ground for discharge. Thus, in *Waley* v. *Johnston*, 316 U. S. 101, this Court, with the Government's consent, directed that the prisoner be given a hearing on his eighth petition for writ of *habeas corpus* despite the fact that his allegations taxed "credulity to the breaking point, especially in view of the lapse of time since his plea of guilty and sentence." Neither *Salinger* v. *Loisel*, 265 U. S. 224 nor *Wong Doo* v. *United States*, 265 U. S. 239, afford the Government any comfort. The dictum in the *Salinger* case rests on the fact that the later *habeas corpus* proceeding was predicated "on the

same grounds that were set up in the earlier case" (p. 230). The *Wong Doo* deportation case, if it has any bearing whatever on the case of a prisoner in a penitentiary as distinguished from a deportee, has relevance only where the prisoner had properly raised the point in his earlier petition, had received a full opportunity at a hearing to present evidence on the point and had refused to avail himself of that opportunity. None of these considerations are present in the case at bar.

IV

The court below and the Government express concern over the flood of petitions for writ of *habeas corpus*. The number of petitions actually being filed do not warrant this concern. Furthermore, this "argument of convenience" is lacking in persuasion when personal liberty and constitutional rights are at stake. Finally, many if not most insubstantial petitions would not have to go to hearing if properly handled by the United States Attorneys.

V

A circuit court of appeals has power under the "all writs" provision of the Judicial Code (28 U. S. C. § 377) to direct that a prisoner be brought before it to argue his own appeal from the denial of his petition for writ of *habeas corpus*. The "all writs" provision is not limited to situations where the court "could not otherwise physically discharge its appellate duties," but applies as "an aid to an appeal" where "reasonably necessary in the interest of justice." *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 273, 274. The court below should have considered petitioner's motion for personal appearance on its merits rather than denying it for want of "power."

ARGUMENT

I

The Court Below Erred in Affirming the Denial of Petitioner's Application as an Abusive Use of the Writ of Habeas Corpus.

The petitioner before this Court has been sentenced to imprisonment for sixty-five years, a life term in all but name. Acting without counsel who had deserted petitioner when funds were no longer available (Record, No. 607, October Term, 1944, p. 25), petitioner unsuccessfully sought to obtain a direct review of his conviction by appeal. He asserts before this Court, as he has before both courts below, that his imprisonment is in violation of his constitutional rights—that he was convicted by the government's knowing use of false testimony. He has never had an opportunity to present evidence on this charge before any court. He asks now one thing only—an opportunity to have the facts underlying this charge heard in the summary way provided for in *habeas corpus* proceedings (Rev. Stat. § 761, 28 U. S. C. § 461). How minute his request becomes when compared to the danger—be it great or small—that an innocent man may languish behind prison walls for the rest of his days.

A

Petitioner's Application for Writ of Habeas Corpus Adequately Raised the Issue of the Government's Knowing Use of False Testimony.

The petition for writ of *habeas corpus* herein, as timely amended, alleged that petitioner's imprisonment was illegal in "that the government knowingly employed false testimony on the trial, to obtain the conviction" (R. 20). The warden's return to the order to show cause did not

deny the truth of this charge (R. 20-21) and, therefore, in no way called upon petitioner to give any further specifications as to the facts underlying this allegation. Petitioner's brief in the Circuit Court of Appeals did, nevertheless, enlarge upon this point by stating that the United States Attorney, in the course of the trial, "did take the one and only witness, Donner, that testified that there had been a crime committed, from the witness stand after he had testified that he could not see any guns or pistols during the robbery, to the district attorney's office, and talked about the evidence and put the witness Donner back on the witness stand to testify that he did see the pistols, and described them, when he could not do so at first" (R. 55). The court below treated "this statement as though it had been incorporated in the petition" (R. 55) and clearly implied, as it could not have done otherwise, that these allegations were sufficient to bring the petition within the doctrine of the *Mooney* case, *infra*, had this been petitioner's first application for writ of *habeas corpus* (R. 55-56).

As this Court has recently stated in reviewing a denial of the writ of *habeas corpus* under similar circumstances in a State court, "petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody, *Mooney* v. *Holohan*, 294 U. S. 103." *Pyle* v. *Kansas*, 317 U. S. 213, 215-216.

There is a suggestion in the opinion of the court below that petitioner "knew as much about the misconduct at the time it is said to have occurred as he knows now" (R. 56) and that, if this were not the fact, it was up to petitioner to have negatived this point in his petition. There is no

warrant in the record for any such assumption of fact nor any duty on petitioner's part to answer it. Petitioner has specifically alleged that the government knowingly used false testimony at the trial to obtain his conviction. The warden's answer did not deny this allegation. In his brief before the court below petitioner set forth some facts underlying this charge (R. 55). It cannot be assumed that this is all the evidence petitioner had or has in support of this charge[2] nor when he became aware of these facts as such or of their significance to his case. The court's compounding of unfavorable assumptions is particularly unrealistic as applied to a layman petitioner drafting his own petition. The implication in the court's opinion that petitioner's application should have denied that he knew all the facts concerning the knowing use of false testimony at the time of the trial or denied that he understood their significance is wholly inconsistent with historical Federal practice that "a petition for *habeas corpus* ought not to be scrutinized with technical nicety." *Holiday* v. *Johnston*, 312 U. S. 342, 350; *Rice* v. *Olson*, 324 U. S. 786, 792. "The petition is not drawn with the desirable precision and clarity. But we can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the law." *Tomkins* v. *Missouri*, 323 U. S. 485, 487.

Apparently the court below after compounding these unfavorable assumptions against petitioner was not prepared to rely upon them, for it rested its decision upon the

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[2] See Judge Denman's dissenting opinion: "The gravamen of the misconduct charged is not the fact that the witness changed his testimony but that the prosecuting attorney knowingly caused the witness to give the false testimony. All the accused and his attorney knew at the trial was that the single prosecuting witness changed his testimony. Obviously this in itself does not warrant a charge of fraud. That it was fraudulently done by persuasion of the prosecuting attorney *could only have been learned after conviction and after the convicted man was in the penitentiary*" (R. 59).

existence of the three earlier petitions for writs of *habeas corpus* rather than upon petitioner's awareness of the government's knowing use of false testimony at the time it occurred. What the situation would be if the record did support the court's assumptions, therefore, need not be considered here. Cf. *Moore* v. *Dempsey*, 261 U. S. 86; *Waley* v. *Johnston*, 316 U. S. 101.

In view of petitioner's undenied allegation of the government's knowing use of false testimony, he was entitled to a hearing before the District Court to present his case. *Walker* v. *Johnston*, 312 U. S. 275; *Waley* v. *Johnston*, 316 U. S. 101. Any "contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." *Walker* v. *Johnston*, 312 U. S. 275, 287. "Petitioner's allegations in the circumstances of this case may tax credulity," *Waley* v. *Johnston*, 316 U. S. 101, 104, but they do not deny him the right to be heard.

B

Petitioner Did Not Intentionally Reserve for Later Use the Issue Presently Before the Court

The court below assumed that petitioner intentionally reserved for later use the ground for release presently relied upon. This assumption, too, was made without basis in fact.

As indicated in the Statement, petitioner, in his inarticulate and legally imprecise manner, did try to raise the knowing use of false testimony earlier. Acting as his own counsel in filing the first petition for writ of *habeas corpus*, he failed to allege the knowing use of false testimony in his application; but he hinted at it in his traverse, and imprecisely raised it in his appeal to the Circuit Court of

Appeals, and in his petition for writ of certiorari in this Court. Apparently the District Court did not consider the allegation in petitioner's traverse about the "methods . . . used to obtain two different statements" at the trial sufficient to raise the issue of the government's knowing use of false testimony for it denied the petition without hearing or opinion. Likewise the matter was not mentioned in the opinion of the Circuit Court of Appeals and presumably was not considered by this Court on the petition for writ of certiorari.

Petitioner again failed to raise this point in his second application for writ of *habeas corpus*. This turned out to be immaterial, however, since the District Court, upon the hearing, excluded all evidence of what occurred at the trial.

Whether the third application for a writ of *habeas corpus* raised the point of the government's knowing use of false testimony does not appear from any papers before this Court or from the published decision of the District Court, 61 F. Supp. 995.

Instead of petitioner intentionally reserving the point on which the present proceeding is based, it seems clear that he made an effort, however legally feeble and unsuccessful, to inject the issue into the proceeding on his first application for writ of *habeas corpus*. What would have happened on his second application, had the District Court not excluded all evidence concerning occurrences at the trial, and what actually did happen on his third application, is not evident from the record. It may well be that petitioner's failure to obtain consideration of this point on his first application discouraged him from trying on the second and third applications—if in fact he did not so try. However that may be, petitioner, by an amendment to his petition for writ of *habeas corpus* in this case, renewed the efforts he had made during the course of the proceedings on his first application and the matter is now properly before this Court.

The court below states that "where there have been repeated petitions with an apparent husbanding of grounds the onus may properly be cast on the applicant of satisfying the court that an abusive use is not being made of the writ" (R. 57). But from whence comes this "apparent" husbanding of grounds? The court below had before it the record on the earli applications for writs of *habeas corpus* and could have informed itself of petitioner's efforts, however imperfect and unsuccessful, to raise this point. The court's assumption that petitioner was lying in prison "husbanding" grounds for future applications is hardly a realistic estimation of the joys of Alcatraz.

Furthermore, the warden's answer did not assert any such "husbanding of grounds." All the warden's answer does, in effect, is to say that three prior petitions had been denied; ergo, the fourth petition must be denied. The layman petitioner could hardly be expected to have assumed from this answer that he was supposed to explain why he had never raised the point before—particularly when he had in fact tried to raise the point in at least one earlier proceeding. Such standards of technical pleading would hardly seem applicable when liberty and justice are the stakes. Even "in days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined." Halsbury, L. C., in *Cox* v. *Hakes*, 1890 A. C. 506, 514.

Furthermore again, the District Court, if it was exercising its discretion and denying the petition because of an intentional reservation of the ground for discharge presently relied upon, should have given petitioner an opportunity to controvert the point. As this Court stated in *Pyle* v. *Kansas*, 317 U. S. 213, 216, "In view of petitioner's inexpert draftsmanship, we of course do not foreclose any procedure designed to achieve more particularity in peti-

tioner's allegations and assertions." Certainly the "apparent husbanding" itself, if it was to be relied upon as the ground of decision, constituted an issue of fact for the District Court and should have been heard under the rule of *Walker* v. *Johnston*, 312 U. S. 275.

C

Petitioner's Failure Properly to Raise the Issue Presently Before the Court on an Earlier Application Is Not an Adequate Ground for Denial of the Present Petition for Habeas Corpus.

As has just been shown, the facts completely controvert the suggestion of the court below that petitioner intentionally reserved the issue that his conviction had been obtained through the knowing use of false testimony in order to husband this ground for later use. Furthermore, if this was to be the ground for the denial of petitioner's application, it was certainly an issue of fact to be heard by the District Court rather than to be assumed against a layman petitioner.

The most that can be assumed against petitioner is that, for reasons not appearing in the record, he now raises a point which was not properly raised in his three previous applications and was therefore not passed upon by the courts in the three earlier proceedings. The legal issue before this Court, therefore, boils down to this: Is it within the discretion of a district court to deny an applicant for the writ of *habeas corpus* a hearing on his allegation of the government's knowing use of false testimony for the one and only reason that he had previously filed three other petitions in which this point was neither properly raised nor determined?

Thus stated, the answer becomes clear. The mere existence of one or more prior petitions for writs of *habeas*

corpus is not a sufficient ground to warrant a denial of a new application setting forth a valid ground for discharge. *Kessler* v. *Strecker*, 307 U. S. 22, 25; *Waley* v. *Johnston*, 316 U. S. 101, 105; *Robinson* v. *Johnston*, 316 U. S. 649; *U. S. ex rel. McCann* v. *Adams*, 320 U. S. 220; *Hawk* v. *Olson*, 326 U. S. 271.

The *Waley* case is on all fours with the case at bar. A writ of *coram nobis* and seven petitions for writs of *habeas corpus* had already been denied; the proceeding before this Court arose on petitioner's eighth application for *habeas corpus* which alleged that his plea of guilty had been coerced. The District Court, in its opinion, made the following comment:

> "This is the eighth petition filed by Waley in this Court, the previous ones having been denied. Appeals were taken in two of the cases which were affirmed.[3] Within the last two years this Court has considered and passed upon more than one hundred petitions for writs presented by inmates of Alcatraz prison. At the risk of shocking judicial decorum, I cannot help observing that conjuring of grounds for petitions in *habeas corpus* is a popular indoor sport at Alcatraz." 38 F. Supp. 408.

The Circuit Court of Appeals affirmed and Waley filed his petition for a writ of certiorari with this Court. The Government did not seek to rely upon the earlier petitions for writs of *habeas corpus* as a ground for denying Waley a hearing on his eighth application. Instead, the Government confessed error, the Solicitor General stating:

> "As was recognized in the dissenting opinion [below], petitioner's allegations 'tax credulity to the

[3] In addition to these two appeals and the denial of at least one petition for writ of certiorari (311 U. S. 649, rehearing denied 311 U. S. 729), this Court had also denied a motion for leave to file a petition for writ of mandamus, 305 U. S. 577, and two motions for leave to file original petitions for writs of *habeas corpus*. 307 U. S. 609, 308 U. S. 528.

breaking point,' especially in view of the lapse of time since his plea of guilty and sentence. But we agree with Judge Stephens that they raise material issues of fact calling for a hearing in accordance with *Walker v. Johnston* . . ." (Memorandum for the Respondent, p. 5).

This Court, without permitting argument, reversed the court below and ordered a hearing before the District Court, stating:

> "The principle of *res judicata* does not apply to a decision of *habeas corpus* refusing to discharge a prisoner, *Salinger v. Loisel*, 265 U. S. 224. . . . It does not appear that on petitioner's earlier application for a writ of *coram nobis* the same issue was raised as that now presented. The earlier application was denied for insufficiency upon its face and without a hearing. There is thus no basis for the holding of the District Court that the denial is *res judicata* of the present petition" (p. 105).

Thus, in the *Waley* case, despite the fact that petitioner's allegations taxed "credulity to the breaking point, especially in view of the lapse of time since his plea of guilty and sentence", and despite the application for writ of *coram nobis*, seven prior applications for *habeas corpus* and miscellaneous other proceedings, this Court, with the Government's consent, directed that the prisoner be given a hearing on his new charge that his plea of guilty had been coerced. No more is asked here.

In the *Robinson* case, this Court reversed the Circuit Court of Appeals for the Ninth Circuit under similar, though less extreme, circumstances.

In the *Hawk* case, this Court reversed the Supreme Court of Nebraska despite the argument of its Attorney General that "petitioner has presented nothing new in his instant application for a writ of certiorari, the same issues having been determined several times before by both the Nebraska

and Federal courts, and for this reason alone the District Court of Lancaster County, Nebraska, was justified in denying the application for the writ." (Brief of Attorney General of Nebraska, p. 26.)

The court below and the Government in its Opposition to Petition for Certiorari rely heavily upon two opinions of this Court. *Salinger* v. *Loisel*, 265 U. S. 224; *Wong Doo* v. *United States*, 265 U. S. 239. Neither of these cases bears on a case such as the instant proceeding where the ground for *habeas corpus* presently relied upon had not been previously considered by the courts.

In the *Salinger* case the question was whether the United States District Court at New Orleans had to or could properly follow the decision of the Circuit Court of Appeals for the Second Circuit denying Salinger a writ of *habeas corpus* predicated on the same grounds as those urged in the District Court at New Orleans. The Court's dictum that the District Court in New Orleans would have been justified in denying the petition for *habeas corpus* pending before it because of the earlier decision by the Second Circuit Court of Appeals was based solely on the fact that the Circuit Court of Appeals had decided the identical question that was being presented to the District Court at New Orleans. The opinion makes this abundantly clear (at pp. 230-231):

> " . . . *the right to arrest and remove in virtue of the indictment was questioned on the same grounds that were set up in the earlier case in New York, where that right was upheld.* Because of this situation, counsel for the appellee invoke the doctrine of *res judicata* and insist that the decision in the New York case was a final adjudication of the right and is binding on all other courts, including this Court. We are unable to go so far . . . But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered . . . : The federal statute . . . does not

lay upon any specific rule on the subject, but directs the court 'to dispose of the party as law and justice require.' A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case; and (b) *a prior refusal to discharge on a like application . . .*" (italics supplied).

Notwithstanding the earlier decision of the Second Circuit Court of Appeals on the identical question presented in the second proceeding, this Court did go on to consider the merits rather than base its decision on the prior proceeding.

The *Wong Doo* case likewise turned upon the point that the issue in the second petition for a writ of *habeas corpus* was identical with that raised in the first petition. In his first petition for writ of *habeas corpus*, a Chinese in custody under an order of deportation challenged the validity of that order on two grounds. The first ground was that the Secretary of Labor issued the order without lawful jurisdiction and the other was that the administrative hearing on which the order rested was unfair and arbitrary. At a hearing before the District Court on these issues, the petitioner offered no proof in support of this second ground. The District Court ruled that the first was not good in law and dismissed the petition and the Circuit Court of Appeals affirmed. In the second petition, the Chinese relied entirely on the ground that the administrative hearing was unfair and arbitrary and this Court affirmed the denial of the second petition with the following statement (at p. 241):

"... The only ground on which the order for deportation was assailed in the second petition had

been set up in the first petition. The petitioner had full opportunity to offer proof of it at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time. *If an alien whose deportation has been ordered can do what was attempted here, it is easy to see that he can postpone the execution of the order indefinitely.* Here the execution already has been postponed almost four years." (Italics supplied.)

The error into which the court below fell is illuminated by its primary reliance upon the *Wong Doo* deportation case. This Court in effect held in that case that the Chinese was deliberately "stalling" in order to remain in this country. It is hard to see how such a case can be considered any precedent whatever for a prisoner in Alcatraz with no possible reason for engaging in dilatory tactics. Furthermore, if it could be considered a precedent to even the remotest degree, its relevance would be limited to a case where the prisoner had properly raised the point in his earlier petition, had received a full opportunity at a hearing to present evidence on the point and had refused to avail himself of that opportunity. None of these considerations are present in the case at bar.

It is not necessary for this Court to decide at this time whether the dictum in the *Salinger* case and the holding in the *Wong Doo* deportation case will be applied in future *habeas corpus* proceedings where a petitioner has previously had a hearing on the ground of which he later

relies.[4] That case is not before this Court and need not be considered now.[5] The significant thing for this case is that the court below and the Government are forced to rely upon decisions of this Court bearing on that problem rather than on the issues presented by the case at bar.

D

The Bugaboo of a Flood of Petitions for Writs of Habeas Corpus

The court below referred to "the tendency of prison inmates in this circuit to multiply petitions, with the result that unnecessary and increasingly heavy burdens are thrown on the courts in districts where federal penitentiaries are located" (R. 57), and the Government in its Opposition to Petition for Certiorari states that "the problem of successive petitions for writs of *habeas corpus* is one which is causing increasing concern to the courts. It does not aid the cause of a person justifiably entitled to relief to have the courts flooded with a mass of successive petitions which

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[4] The majority view in state courts seems to be that even the same ground may be relitigated in a hearing on a subsequent petition. *Rogers* v. *Superior Court*, 145 Cal. 88, 78 P. 344 (1904); *People ex rel. Carlstrom* v. *Shurtleff*, 355 Ill. 210, 189 N. E. 291 (1933); *People ex rel. Maglori* v. *Siman*, 284 Ill. 28, 119 N. E. 940 (1918); *Crebs* v. *Hudspeth*, 160 Kans. 650, 164 P. 2d 338 (1945); *In re Clyne*, 52 Kans. 441, 35 P. 23 (1893); *Cusic* v. *Jones*, 239 Ky. 538, 39 S. W. 2d 1005 (1931); *In re Snell*, 31 Minn. 110, 16 N. W. 692 (1883); *In re Clark*, 208 Mo. 121, 106 S. W. 990 (1907); *In re Pyle*, 72 Mont. 494, 234 P. 254 (1925); *Ex parte Nabors*, 33 N. M. 324, 267 P. 58 (1928); *Ex parte Burton*, 58 Okla. 754, 161 P. 552 (1916); *Ex parte Johnson*, 1 Okla. Crim. Rep. 414, 98 P. 461 (1908); *In re Turner*, 92 Vt. 210, 102 A. 943 (1918); *Miskimmins* v. *Shaver*, 8 Wyo. 392, 58 P. 411 (1899).

[5] Also not presented here is the case of a layman petitioner intentionally reserving one ground for release while he litigates another ground he erroneously considers sure of success. In such a case, as Judge Denman asks, "should a man imprisoned on a sentence for life, invalid on its face, spend the remainder of his days in the penitentiary if he 'had access to' knowledge of its invalidity and nevertheless filed a first petition on another ground" (R. 63)?

mus' go to hearing, however unsubstantial their foundation" (p. 8).

In the first place, the number of petitions actually being filed hardly warrant this concern. "If the Courts below are apprehensive about the rate at which petitions for the writ are filed in their judicial district by inmates of Alcatraz, it must be remembered that over a ten year period only 368 petitions were filed in the District Court below. This would not seem to establish a worrisome burden. It means that each of the four district judges has been required to pass upon an average of nine such petitions per year" (Brief for the American Civil Liberties Union of Northern California, *Amicus Curiae*, pp. 14-15). Nor has there been any significant increase in recent years despite decisions such as that in the *Waley* case. The average number of petitions for *habeas corpus* filed in the Northern District of California during the fiscal years 1943 through 1945, according to figures supplied by the Administrative Office of the United States Courts, was only forty per year or ten per judge. If the burden should ever become too great, the answer would be in additional judges, not restrictions on the great writ of *habeas corpus*.

In the second place, this "argument of convenience" is lacking in persuasion when personal liberty and constitutional rights are at stake. "If the inconvenience were great, the citizen's right to liberty is greater." *In re Snell*, 31 Minn. 110, 113, 16 N. W. 692, 693 (1883).

Finally, the truth of the matter is that multiple petitions for *habeas corpus*, if insubstantial, do not have to go to hearing and burden the courts. The real cause for the difficulty in the case at bar is the cursory and inadequate treatment given the case by the United States Attorney. The warden's answer, filed by the United States Attorney, seems almost a calculated effort to force the courts below to accept the principle that the three earlier petitions were *per se* grounds for denying the fourth petition; the alternative for the courts

was to wade through three long records to find out what the case was about. Had the United States Attorney done his job properly, this case might very well not be here. If he intended to rely upon some abuse of the writ of *habeas corpus—e. g.*, the intentional husbanding of grounds for later use—he could have asserted this ground and forced petitioner to show his hand. If he intended to challenge the merits of petitioner's case, he could have denied petitioner's allegation of the knowing use of false testimony and filed a statement of the facts as he understood them. This would have placed on petitioner the burden of setting forth sufficient facts so that the District Court could have determined whether there was any real issue of fact to be heard. *Walker* v. *Johnston*, 312 U. S. 275; *Waley* v. *Johnston*, 316 U. S. 101. In either event, this proceeding might have terminated at an earlier stage. The denial of the petition can hardly be supported on the ground of saving the courts from undue burden when there are methods of accomplishing this end more consistent with the protection of personal liberty and constitutional rights.

II

The Court Below Erred in Holding That It Was Without Power to Direct That Petitioner Be Brought Before It to Argue His Own Appeal.

Congress has expressly provided in Section 262 of the Judicial Code that the circuit courts of appeal "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." 28 U. S. C. § 377. A majority of the court below held that "unless the statutory phrase 'necessary for the exercise of their respective jurisdictions' is to be stripped of all meaning, the prescribed condition can not be said to be met. The case is already before us for final

disposition, and no impediment of any sort confronts us (R. 46)." The suggestion of the court below that the writ can only be issued to overcome some physical impediment preventing the court from acting is the same argument that was squarely rejected by this Court in *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269. The question there was whether the Circuit Court of Appeals had properly issued a writ of *habeas corpus* to test out the validity of a waiver of jury trial by a lawyerless defendant, when this same issue could have been decided in the pending appeal, though less expeditiously and conveniently to all concerned. Approving the issuance of the writ, this Court stated flatly that "a circuit court of appeals is not limited to issuing a writ of *habeas corpus* only when it finds that it is 'necessary' in the sense that the court could not otherwise physically discharge its appellate duties" (at p. 273). After rejecting the narrow interpretation of the "all writs" section adopted by the court below in the instant case, this Court went on to state the clear rule that "in exceptional cases where, because of special circumstances, its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice, the writ of *habeas corpus* is available to a circuit court of appeals" (at p. 274). What is "reasonably necessary in the interest of justice" varies from case to case. But that the power to issue the writ is not limited to cases where the appellate court could not otherwise perform its functions is now too clear for belabored discussion. See also *Whitney* v. *Dick*, 202 U. S. 132, 136-137; Section 272 of the Judicial Code, 28 U. S. C. § 394.

The Government in its Opposition to Petition for Certiorari does not seriously question this conclusion. It argues primarily that it is unnecessary to consider this issue in the instant case because, even if the Circuit Court of Appeals had known that it had the power to act, it would have

exercised its discretion to deny the writ. This contention would, if accepted, require this Court to substitute its own discretion for that of the court below. Unless it would have been an abuse of discretion for the court below to have issued the writ, it would certainly not seem appropriate for this Court at this time to tell the court below that it could not exercise its discretion to issue the writ.

On the issue of discretion, the Government referred to several factors allegedly demonstrating why there would be no warrant for the court below exercising its discretion in favor of granting petitioner's motion to argue his own case (p. 9):

(1) "The question involved on petitioner's appeal was one of judicial policy, in regard to which the arguments of a layman could have little significance." But the court below relied largely on a question of fact—the "apparent husbanding of grounds." Certainly, if this point was troubling the court below at the oral argument, petitioner could have thrown substantial light on the matter by explaining his efforts to get the point before the courts in at least the proceedings on his first application.

(2) "Whatever considerations petitioner wished to advance could be fully presented in briefs." This might well be an argument if both sides had presented their case on briefs. See *Goldsmith* v. *Sanford*, 132 F. (2d) 126, 127 (C. C. A. 5th, 1942), certiorari denied 318 U. S. 762, rehearing denied 318 U. S. 799. But here the Assistant United States Attorney argued the case orally without opposition. Furthermore, the brief filed by the Government was so skimpy and inadequate that petitioner had no real notice of what the Government's argument in court would be and was wholly unable to answer it by his brief. The Government's brief in the court below is set forth in full in the Appendix.

(3) "Petitioner was confined in a penitentiary set aside for the incarceration of hardened criminals and the court below was clearly justified in taking into consideration the potentialities of escape and the expense to the Government of requiring the production of petitioner under guard." Of course this was a relevant consideration for the court below to weigh against the considerations presented by petitioner that he be allowed to argue his own case "in the interest of justice." But certainly this factor alone would not make the granting of the writ an abuse of discretion and therefore this Court ought not to withhold decision on the question of "power" simply because the decision on "discretion" might have gone against petitioner.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

JOSEPH L. RAUH, JR.,
Counsel for Petitioner.

IRVING J. LEVY,
WILLIAM W. KRAMER,
Of Counsel.

December, 1947.

APPENDIX

No. 11,334

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

HOMER C. PRICE, *Appellant*,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California, *Appellee*

BRIEF FOR APPELLEE

Jurisdictional Statement

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below," denying appellant's petition for writ of habeas corpus and discharging the order to show cause (Tr. 32). The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U. S. C. A. Sections 451, 452 and 453. Jurisdiction to review the District Court's order denying the petition is conferred upon this Court by Title 28 U. S. C. A. Sections 463 and 225.

Statement of the Case

The appellant, an inmate of the United States Penitentiary at Alcatraz Island, California, filed a petition for a writ of habeas corpus (Tr. 1-19), and the Court below issued an order to show cause (Tr. 20). The appellant likewise filed an "Amendment to the Application for Writ of Habeas Corpus" (Tr. 21). Thereafter the appellee filed a return to the order to show cause (Tr. 22-23), and a memorandum of points and authorities in support thereof contending that the petition should be denied on the basis of the prior denials in habeas corpus cases numbered 23268-W, 23721-R and 25040-S (Tr. 24-25). The appellant then filed a "Traverse to Respondent's Answer to Amended Application for

Writ of Habeas Corpus" (Tr. 27-31). The matter was then submitted and the Court below filed its written order denying the petition for writ of habeas corpus and discharging the order to show cause (Tr. 32). From this order appellant now appeals to this Honorable Court (Tr. 37).

Question

Was the Court below under an obligation to produce the body of appellant before it to determine if he was entitled to his discharge?

Contention of Appellee

The answer to the above stated question is: No.

Argument

On the record before it, the Court below was under no obligation to issue the writ and properly decided the merits of appellant's petition on the order to show cause.

In denying the third application of appellant for a writ of habeas corpus, his Honor United States District Judge A. F. St. Sure filed the following memorandum and order:

> "Petitioner seeks his release from Alcatraz Penitentiary on this third petition for writ of habeas corpus. The first, No. 23268-W, was heard and denied on January 14, 1941 by Judge Martin I. Welsh. On appeal, with the entire record of the matter before it, and after lengthy discussion, the judgment of the District Court was affirmed. Price *v.* Johnston, 125 F. (2d) 806. Certiorari was denied by the United States Supreme Court, 316 U. S. 677. The second petition, No. 23721-R, was heard by Judge Michael J. Roche, petitioner being present in court, and was denied by Judge Roche on September 8, 1943. On appeal the order of the District Court was affirmed. Price *v.* Johnston, 144 F. (2d) 260.
>
> "Petitioner alleges 'that the questions now raised were not raised in the prior petitions Nos. 23268-W and 10.671 R.' However, these matters were known to petitioner when he filed the petitions in 23268-W and

23721-R. If petitioner intended to rely on these matters he should have urged them in 23268-W. 'To reserve them for use in a later proceeding "was to make abusive use of the writ of habeas corpus."' Swihart *v.* Johnston, United States Circuit Court of Appeals for the Ninth Circuit, decided August 6, 1945.

"Since upon the face of the petition petitioner is not entitled to the writ, Walker *v.* Johnston, 312 U. S. 275, 284, it is therefore

"Ordered:

"The petition for writ of habeas corpus is hereby

"Denied.

"Dated: August 22, 1945."

(Tr. 24-25.)

Appellee is in accord with the reasoning of Judge St. Sure and the authorities cited in his memorandum and order denying appellant's third application for a writ of habeas corpus, and hereby adopts them *in toto* as his argument on this appeal to sustain the Court below in its decision denying appellant's fourth application for a writ of habeas corpus in our case at bar.

Conclusion

In view of the foregoing, it is respectfully submitted that the order of the Court below in denying petition for writ of habeas corpus is correct and should be affirmed.

Dated, San Francisco, August 2, 1946.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee.